IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 616 OF 1988

Rahimbax Adam Pendhari
R/o Rukadi, Tal. Hatkanagale,
Dist. Kolhapur; & ors. ... Appellants

V/s

Ibrahim Adam Pendhari
R/o Rukadi, Tal. Hatkanagale,
Dist. Kolhapur; & ors. ... Respondents

Mr. T.S. Ingale for the appellants.

Mr. V.B. Rajure for the Respondent Nos. 1 & 2.

Mr. K.V. Saste for the Respondent No.3.

CORAM: P.V. KAKADE, J.

DATED: 30TH JUNE, 2005

ORAL JUDGMENT:

1. This second appeal was preferred against the judgment and order passed by the Addl. District Judge, Kolhapur, dated 29th December, 1987 dismissing the appellants' appeal and confirming the judgment and order passed by the Civil Judge, Jr.Divn., Ichalkaranji, dated 25.3.1983 dismissing the suit of the plaintiffs.

2. At the time of admission of this appeal, the

admission Court framed a substantial question of law to the effect that whether both the Courts below were right in holding that the plaintiffs were not the legitimate children of deceased Adam, especially and particularly when the deceased Adam himself, by Exhs. 43 and 36, had categorically admitted the said fact. Further it was recorded that, in view of the principles laid down under Mohamedan Law, as per Clause 75 of the said law, when all those conditions having been fulfilled, such as acknowledgement of legitimacy by the father, whether the Courts below were right, inspite of this being the position, to deny the status of legitimate heirs of deceased Adam and non-suit them.

3. Before turning to the evidential aspects relating to the question of law sought to be raised, it would be just and proper on my part to advert to the factual aspects involved in the dispute.

The plaintiffs filed the suit for possession of the suit property alleging that the suit property was originally belong to one Adam Pendhari. Adam had two wives, namely, Noorbi and Akkamma. Defendants 1 to 5 are the children of Adam from Noorbi and plaintiffs are the children of Adam from Akkamma. The property block

No.413 located at village Rukadi was the property belonging to the mother of Akkamma. She gave property to plaintiff No.3 by way of a will. However, Adam took this property from plaintiff No.3 under a gift dated 22.4.1982. The property mentioned in para 1B of the plaint came to Adam from his father. The property described in para 1C and 1D of the plaint was acquired by Adam with the help of the income from the property Block No. 413. The property described in para 1E is house property acquired by Adam from his father. The brother of Adam named Bapulal separated from him many years ago and got his half share in the properties which were ancestral one. Adam expired on 6.10.1971. After his death, the names of defendants were recorded to the village record of the suit property. Plaintiffs 1 and 2 having their 2/13 each share in the suit property, whereas plaintiff No.3 was having 1/13 share. Plaintiffs therefore prayed for partition of the suit property and separate possession of the shares.

4. Defendants 1 to 5 challenged the suit by filing written statement contending that the suit property belongs to Adam and he was owner of the same till the time of his death. Adam married only with Noorbi during his life time. According to them, Akkamma was wife of

one Balvant Naik. They had a daughter. Akkamma got some property from her mother. She was kept as mistress of Adam. The plaintiffs are the legitimate children begotten from Adam, therefore, have no right to claim the suit property. Plaintiff No.3 though is in possession of the property described in para 1A of the plaint. It was further contended that the plaintiff No.3 is not the owner of the suit property and she is residing there with the consent of the defendants. On these coupled with other grounds, the defendants have sought dismissal of the suit with costs.

5. The learned Trial Judge adjudicated the suit on merits and came to the conclusion that the plaintiffs have failed to prove that they had 5/13 share in the suit property. It was also held that the plaintiffs failed to prove their mother Akkamma was the legally wedded wife of Adam, and on that basis it was held that plaintiffs were not entitled to partition and separate possession of the suit property and, as such, the suit came to be dismissed.

The appeal was carried to the District Court, Kolhapur. The learned Addl. District Judge, Kolhapur, after hearing both parties and on the available evidence

confirmed the findings recorded by the learned Trial Judge and dismissed the appeal. Hence the present appeal.

6. As noted earlier, the substantial questions of law were framed by the admission Court as noted above. Having considered all the relevant aspects, I am of the view that the only question involved in this dispute is regarding legitimacy of alleged marriage between Adam and Akkamma and with regard to the so called acknowledgment of such legitimacy of paternity by Adam in respect of the plaintiffs.

7. I have heard the learned counsel for both parties. Perused the record and available record in this appeal. It is not in dispute that the suit property is originally owned by one Adam. It is also not in dispute that he had wife by name Noorbi and defendants 1 to 5 are children from Adam from Noorbi. However, it is an admitted position that plaintiffs are the children of Akkamma from Adam. Therefore, the only dispute is whether the children are legitimate children of Adam from Akkamma or not. It is the contention of the plaintiffs, that they are the legitimate children of Adam from Akkamma as she was the wife of Adam. However,

it is specifically denied by the defendants that Akkamma was not the legally wedded wife of Adam.

In order to bring home the findings in their favour, plaintiffs have relied upon certain documents as well as oral evidence. Perusal of such evidence makes it clear that the defendants have not denied specifically that Adam is the father of plaintiffs. However, they have specifically denied the status of Akkamma as the wife of Adam. The record shows that Akkamma died on 11.4.1933. The said death extract Exh.44 shows the name of Akkamma as wife of Balvant Naik in the said document. Her caste is also shown as Jain. Therefore, it is clear from the death extract that the name of Akkamma was shown to be the wife of not Adam but of one Balvant Naik who belonged to Jain religion. Besides this aspect, it is to be noted that plaintiff No.3 who was examined on behalf of the other plaintiffs has stated in her deposition that she does not know whether her mother was a keep or wife of Adam. She has further stated in the cross-examination that she does not know her caste as well as how her mother Akkamma gave land to her. In other words, the evidence of plaintiff No.3 which was led on behalf of the plaintiffs is of no value at all in order to support the plaintiffs' case regarding alleged

marriage between Akkamma and Adam.

Much ado was made of the document of will Exh.43 evidently executed by Akkamma wherein it is clear that she has bequethed the suit property in favour of the plaintiffs mentioning that they were children begotten to her from Adam. However, in fact, it must be noted that there is no dispute regarding that aspect. The document of will further shows that Akkamma is shown to be wife/widow of Balwant Naik and the same document itself cannot be held to be the acknowledgement on part of Akkamma regarding her marriage to Adam. It is significant to note that Adam was witness to the said will and he has put his thumb impression on the said document. If it was so, then it must be held that Adam had knowledge of the fact that Akkamma was for all the time considered the wife of Balwant Naik and not his and, therefore, it cannot be said that even by implication Adam married Akkamma to be his wife at any given time. Much was tried to be argued on behalf of the appellants that gift deed at Exh.36 and recitals of document at Exh.38 were sufficient to show that Adam acknowledged the plaintiffs as his children. However, one thing is clear that acknowledgment by Adam of the plaintiffs as his children will not by itself would show

that the said children are legitimate children of Adam. In order to have plaintiffs a status of legitimate children of Adam, there must be a legal tie between Adam and Akkamma as that of wife and husband. In absence of such evidence, it cannot be said that plaintiffs were legitimate children begotten from legal wedding between Akkamma and Adam. In this regard plaintiffs have examined one witness PW-3 Sayyad who alleges that he was present at the time of marriage acknowledged between Akkamma and Adam. However, perusal of his evidence clearly shows that he is not reliable witness and bare word to the effect that he was present at the time of marriage would not go to show that he has acknowledged the marriage. Therefore, his evidence is of no help to the present appellants.

The learned counsel for the appellants brought to my notice the provision of Sec.75 of the Mohamedan Law which deals with acknowledgment of paternity. The said provision stipulates that acknowledgment, express or emplied, by a person who is of sound mind that another person is his child or that the mother of the child is his wife by valid marriage confers upon such child the status of legitimacy provided that the following conditions are satisfied :-

(a) that the marriage is not disproved;

(b) that the acknowledgment is one of the legitimacy of the child;

(c) that the relationship is not impossible by reason of disparity between the ages or otherwise;

(d) that the person acknowledged, if he has attained discretion, does not repudiate the acknowldedgement.

(2) An acknowledgment of paternity of a child by the mother would also, subject to the same conditions, confer the status of legitimacy on the child if the acknowledgment is confirmed by the husband or is not opposed by any other heirs if the husband is dead.

In my view, there cannot be two opinions regarding the said provisions under the Mohamedan Law. However, in order to fulfil the conditions stipulated thereunder, it must be initially established that there was legal wedding

between the parties in order to raise presumption regarding legitimacy of the children begotten from the union of the two persons. In fact, the plaint itself is silent on this point that Adam had ever acknowledged the plaintiffs as his legitimate children or even acknowledged Akkamma as his legal wedded wife. Considering the said conditions mentioned in Sec. 75, it is clear that Akkamma had never acknowledged herself as wife of Adam. In view of the said aspects, Adam had never admitted the plaintiff as his legitimate children and, therefore, the entire foundation of the plaintiffs' case goes away when the evidence is sufficient to show that neither Akkamma nor Adam acknowledged their legitimacy of plaintiffs as their children.

8. In view of this position, there is no doubt whatsoever that both the Courts below have rightly appreciated the entire evidence on record and have come to the conclusion that the plaintiffs have not proved that Adam and Akkamma were lebgally wedded nor there is any evidence to show that they had any time acknowledged the legitimacy in any manner of their children who are plaintiffs.

In the result, the appeal stands dismissed. In view of the facts and circumstances, there shall not be any order

as to costs.

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